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Church-State Relations and Religious Convictions

R. Kent Greenawalt
Columbia University School of Law

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CHURCH-STATE RELATIONS AND RELIGIOUS CONVICTIONS*

R. KENT GREENAWALT**

I. INTRODUCTION

Since the title of my talk is hardly self-explanatory, I want to begin by outlining my topic. My overall concern is with the proper place of religious convictions in lawmaking in our society. My special focus is on the place of religious convictions in the political resolution of church-state issues.

We hear with some frequency that one group or another is attempting to impose its religious views on the rest of us. The clear implication of such remarks is that impositions of this kind are not in accord with the underlying premises of our liberal democracy. A constitutional claim may lurk in the background: that legislation constituting an imposition would violate the religion guarantees of the Constitution. But the main force of the complaint is not legal. It is that people who try to impose their religious views are not playing by the rules of our kind of government. This is a claim about the political philosophy of liberal democracy.

Though I shall comment in passing on various constitutional issues, the main thrust of my comments also lies within the domain of political

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** Cardozo Professor of Jurisprudence, Columbia University School of Law.

philosophy. I want to ask how far citizens and public officials properly rely on religious convictions as they formulate positions on political issues. I ask more particularly how far they do so in respect to what are commonly identified as church-state problems.

What I am going to say does not have the same sort of potential practical effect as a proposed rule of law. I am not primarily concerned with external restraint, but with how people in our society decide and debate important political issues. If you were to find my remarks wholly convincing, a most unlikely supposition, their force might affect how you looked at things and evaluated the positions of others. Over time such altered perceptions could make a difference, but neither the changes in perceptions nor their effects on political outcomes would be easily discernible.

My remarks should be viewed against one particular perspective about how citizens and officials should reach political judgments. Roughly the idea, notably represented in the work of our greatest social philosopher, John Rawls,[1] and of my brilliant colleague, Bruce Ackerman,[2] is that in our liberal democracy people should reach political decisions on the basis of shared political principles and publicly accessible reasons. A restriction to these bases would prevent both attempts by citizens to promote particular religious positions in the political process and self-conscious reliance on religious convictions in determining their stances on political issues. No one supposes that religious citizens will ever be wholly uninfluenced by their particular religious convictions; the thesis is that in their political lives they should try to be. What this means in the context of church-state issues is that people should try to adopt a perspective that is neutral among religious positions, one that does not assume, for example, the truth of fundamentalist Protestantism, liberal Protestantism, Roman Catholicism, Judaism in some form, or atheism.

In fact, many *arguments* that are often advanced about church-state issues do meet this constraint. When people urge that religious schools should receive state aid because the state should pay for the secular benefits the schools provide and because people should be free to practice their religious faith as they see fit, their arguments should carry force with nonreligious persons as well as religious ones. The arguments are not dependent on any particular view about religious truth.

I agree with one fundamental premise of those who wish to exclude religious convictions. I agree that the promotion of religious views and practices is not the business of the state in our society. Nevertheless, I strongly resist the idea that either this premise or any other premise underlying our liberal democracy requires good liberal citizens to try to disregard their religious convictions when they resolve many political

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[1] *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE (1971); Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985).

[2] B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

issues. The emphasis of my remarks is that we should not expect people to try to resolve important church-state issues in this way.

Perhaps my most important insight is that discussions of the place of religious convictions tend to oversimplify many of the relevant questions. You may respond that such is the nature of all political debate; but the difficulty is even greater in this area, perhaps because of people's sensitivity about religion. If I accomplish nothing else, I hope I can persuade you that the problem is complex and deserves our careful thought, not misleading slogans.

I shall roughly distinguish three different ways in which religious convictions may figure in political choice. I argue that citizens and legislators should not rely on religious convictions in the first two ways, but that they often may properly rely on them in the third way.

I indicate the implications of these general conclusions for church-state issues. What I mean by church-state issues are issues that directly involve the treatment of religious practices, groups or believers. My three main illustrations are school prayer and a moment of silence, public aid to parochial schools, and accommodations to religious conscience. What I treat as *other* issues of public policy include matters like abortion, "deviant" sexual acts, and military preparedness. These are issues as to which religious convictions may figure, but they do not directly concern religious practices, organizations or persons.

The first way in which religious views may figure in political choice is when a citizen or legislator takes the promotion of good religious perspectives as a political objective. The second way religious views may figure is in leading people to identify practices as wrong simply because the practices offend religious ideas of correct behavior. The third way is that religious convictions can influence one's sense of how society should best protect interests that can be understood in nonreligious terms. These convictions can affect one's views of which entities warrant protection, of what are relevant facts, and of how clashes among competing values should be resolved. As I have said, my claim is that the first two kinds of reliance on religious convictions are not appropriate, but that the third kind of reliance is proper. After quickly indicating my views about the first two sorts of reliance, I shall concentrate my efforts on the third, which is the subject of great confusion and uninformed disagreement.

II. Sponsorship of Religious Views

Beginning with *Everson v. Board of Education*[3] in 1947, Supreme Court cases interpreting the Establishment Clause stand for the principle that government should not sponsor religious views or practices. This idea,

[3] 330 U.S. 1 (1947).

that the promotion of religion is not the business of the government, has animated decisions that sharply restrict public aid to private sectarian education,[4] that bar organized prayer in public schools,[5] and that protect the teaching of evolution.[6] Not every decision fits this principle comfortably. One thinks, for example, of the cases upholding tax exemptions,[7] permitting creches in public parks,[8] and sustaining prayer by paid chaplains before legislative bodies.[9] But whatever it has *done*, the Supreme Court has not strayed from stated adherence to the basic principle of nonsponsorship.

As a constitutional standard, this principle has been subject to two related objections. One is that the Establishment Clause applies directly only to the federal government and was not made applicable against the states by the fourteenth amendment. Despite the Court's consistent assumption since *Everson* that the rule of no establishment does apply to the states, this issue never quite dies. Although the point is within the realm over which reasonable people can argue, the Establishment Clause is very closely linked to the Free Exercise Clause. In my opinion, sound interpretive practices have made both applicable against the states. In any event, the rule to that effect is firmly settled, and since most states have their own constitutional language barring establishment of religion, the particular reach of federal constitutional law is not critical for most practical purposes.

The second objection to the constitutional principle of nonsponsorship is more troubling. It is that the First Amendment, and analogous state provisions, were not meant to bar government sponsorship of religious ideas, or Christian ideas, or Judeo-Christian ideas in general; they were meant only to bar preferences for particular sects and their ideas. My own view, undefended here, is that given the present degree of religious diversity in the United States, the Constitution has rightly been interpreted to encompass a broad principle of nonsponsorship. Whether or not its use as a constitutional standard is correct, the principle of nonsponsorship is sound as a matter of political philosophy. It most adequately represents our country's tradition of religious tolerance and government separation from religion as applied to modern social conditions. Although religious underpinnings may be supportive of a healthy civic order, I strongly doubt that the way to provide them is by government promotion of religious ideas. I thus begin my reflections on

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[4] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985).
[5] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
[6] Epperson v. Arkansas, 393 U.S. 97 (1968).
[7] Walz v. Tax Comm'r of New York, 397 U.S. 664 (1970).
[8] Lynch v. Donnelly, 465 U.S. 668 (1984).
[9] Marsh v. Chambers, 463 U.S. 783 (1983).

what citizens and officials should do with the judgment that our liberal government should not sponsor religious ideas and practices.

What implications, if any, does this judgment have for the activities of individuals? One understanding of liberal democracy with a written constitution is that people may appropriately urge whatever programs they want for whatever reasons matter to them. On this understanding, constraints on what the government should do become relevant only when official government action is taken or when officials deliberate about what to do. Moreover, the constraints may concern only forbidden outcomes, not the motivations that determine choice within the permissible range of outcomes. I accept a richer view of the significance of constraints on what our government should do. I assume, first, that good liberal citizens should not *promote* outcomes that would themselves be improper. Thus, if nonsponsorship is a sound political principle, citizens guided by the underlying premises of our polity should not seek to get the government to sponsor particular religious perspectives. Further, for outcomes within the permissible range, a good liberal citizen does not support one outcome rather than another because he thinks it likely to promote the improper objective in some direct way. Suppose it were true that membership in the Serbian Orthodox church increases in the United States when relations with Yugoslavia are good. A desire to increase membership in that church is not in and of itself a proper reason for supporting a particular foreign policy toward Yugoslavia, since, from the standpoint of our liberal government, whether people belong to the Serbian Orthodox church, another church, or no church is not a matter of concern. So also, it would be wrong to support a prohibition on homosexual acts because one hoped that such a prohibition would enhance acceptance of a particular religious faith that condemns such acts as wrong. This constraint on one's grounds of support for particular political views applies not only to the bases on which one advocates a position, but also to the grounds one takes as determinative in developing a position for oneself.

What is the importance of these conclusions for church-state issues? I do not want to suggest that supporting an outcome that has been declared unconstitutional is necessarily illiberal. A citizen may think that the constitution has been wrongly interpreted or should be altered in some respect. Political opposition to positions taken by the Supreme Court is within the range of good liberal citizenship. But the good liberal citizen should not support an outcome that he recognizes is at odds with the basic principle of nonsponsorship. And when a certain form of government involvement, say financial aid to religious hospitals, is within the boundaries permitted by the basic principle of nonsponsorship, a good citizen should not support a particular degree or kind of assistance for the reason that such assistance will promote the religion in which he believes.

I turn now to a trickier point. Suppose Janet takes the following attitude:

> Various private activities that serve the public get public support. I am especially interested in this religious hospital and I should like it to flourish, partly because of its religious significance. I think I and people like me are entitled to a degree of support similar to that given similar nonreligious private activities.

Such grounds for assistance do not violate the principle of nonsponsorship, as I understand it. The significance of Janet's religion figures indirectly here. Her interest in the hospital does derive partly from its promotion of religious values and she does seek state support of the hospital, but she recognizes that the basis for state support is not promotion of any religious message, but serving public welfare in a more general sense and according parity among useful private activities. This basis of seeking state aid, though perhaps only subtly distinguished from seeking to have one's religious values promoted, is not out of step with liberal principles.

My conclusions about official actions are consonant with those I have drawn about private individuals. Officials should not be guided by the aim of sponsoring religious positions, nor should they defer to constituency opinion that is based on that aim.

III. Religious Notions of Wrong

A different role that religious convictions can play in political decisions is to affect judgment about what is wrongful behavior. A person may wish the state to prevent wrongful acts even though he does not expect it to promote his particular religious perspectives. In this section, I shall first address what I shall call judgments of wrongness independent of harm to secular interests. Such judgments are rarely involved in typical church-state issues, but it is important to distinguish them from judgments that are often made in church-state contexts.

The most convenient example for "pure" judgments of wrongness is consenting sexual acts among adults. Is it appropriate for the government to forbid such acts simply because they are deemed wrong? Is it appropriate for citizens to support such prohibitions simply because they believe such acts are wrong?

The Supreme Court faced this issue as a matter of constitutional law in *Bowers v. Hardwick*,[10] the 1986 case involving a homosexual's challenge to Georgia's sodomy statute. For the Court, Justice White rejected out of hand the claim that, for constitutional purposes, belief in the immorality of homosexual sodomy is not enough by itself to ground a prohibition.[11]

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[10] 106 S. Ct. 2841 (1986).

[11] *Id.* at 2846.

The four dissenters took a different view. For them, Justice Blackmun asserted that "The legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine."[12] The dissent makes clear that what it thinks is needed is some genuine damage to cognizable interests.

My concern here does not lie either in the constitutionality or overall wisdom of a prohibition of homosexual acts. I am focusing on what are appropriate bases for legislation in this polity. Let me be a little more precise about how my concern differs from the constitutional question. First, legislators may be permitted constitutionally to make some decisions that are not in accord with underlying premises of our liberal democracy. Constitutional permissibility does not establish soundness from the standpoint of political philosophy. Second, unconstitutionality does not necessarily establish that legislation is based on *improper* grounds. A statute based on appropriate grounds may still be invalid because it impinges on some fundamental liberty. I am not evaluating the moral or legal strength of the claim that people should be left free to make basic decisions about sexual expression; I am only asking whether particular grounds for restriction are proper.

One further clarification is needed. I am not considering claims that certain sexual acts undermine marriages or make the people who engage in them unhappy. Such claims do refer to the secular interests of others or of the actors themselves. I address only the simpler claim: "These acts should be stopped because they are unnatural and wrong in themselves."

For this claim, it may clarify matters to focus on sodomy committed by married couples, almost certainly constitutionally protected under *Griswold v. Connecticut*,[13] but covered by the Georgia statute as written. It is not easy to perceive how oral and anal sex is likely to hurt the lives of the married couple themselves or of others. Suppose that someone concedes this, but believes that these sexual acts are forbidden by God. Is that opinion, if widely shared, an appropriate basis for prohibiting the acts? I claim that it is not. Let me repeat that I am not relying here on some fundamental right of the married couple to choose their own sexual practices, a right that could outweigh otherwise legitimate reasons to prohibit. Rather, I am asserting that this reason to prohibit is itself not legitimate.

The rationale for my position is based on the principle of nonsponsorship. If promotion of religion is not the business of the state, laws should serve some interest comprehensible in secular terms. If all that can be said about a practice is that it violates a religious notion of

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[12] *Id.* at 2854-55.

[13] 381 U.S. 479 (1965).

wrong, then to prohibit that practice is to force a religious morality on persons who do not accept it. Although the aim of the legislation may not be to promote any particular religious perspective, the legislation does implement a religious perspective about proper behavior, and it does so without any assertion of danger to secular interests. That is improper in a liberal democracy.

In light of these remarks, the majority opinion in *Bowers* is revealed as deeply unsatisfactory on the relevant point. Justice White comments, "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[14] This passage blurs the different sorts of moral judgments that underlie prohibitive legislation. Usually the notions of morality that count are ideas about how to protect undeniable interests. Relatively few laws rest on moral judgments that are detached from serious claims of harm to secular interests.

I want now briefly to address some complexities. Whenever people think that God forbids behavior, the knowledge that people engage in the behavior may cause them some unhappiness. Further a failure to prohibit *may* involve some cost in social cohesion. Are these legitimate bases for prohibition even if the direct aim to suppress the wrong is not? I am inclined to think that in a liberal society such bases for prohibition, when they are parasitic on people's underlying notion that harmless behavior is wrong, should be treated with great suspicion. Perhaps simple unhappiness that comes from knowing that "bad" acts are taking place should never count, and a social cohesion argument for enforcing illiberal impulses should carry the day only if the severe strains of a contrary legal approach are indisputable. In any event, the strength of claims based on unhappiness and social cohesion will depend in context on factual judgments that are quite different from the simple conclusions that many people condemn the behavior.[15]

The principle I have defended is that in our society behavior should not be prohibited simply because it offends religious notions of wrong; such ideas of offensiveness are not an appropriate basis for citizens to support prohibitions.[16] As I have said, this principle has little importance for typical church-state issues; but it affords an important standard of

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[14] 106 S. Ct. at 2846.

[15] No doubt people who condemn behavior as wrong often think it also does have harmful effects on those who engage in it and on others, and their religious beliefs may affect those judgments. What I have said so far does not touch these evaluations.

[16] Strictly speaking this principle can also be extended to reach nonreligious notions of wrong that bear no relation to secular interests; but such nonreligious notions of wrong do not figure prominently in this country.

comparison for kinds of reliances on religious convictions that do touch those issues.

IV. Religiously Influenced Judgments About Protecting Interests

A. *Determination of Facts, Weighing of Conflicting Values, and Borderline of Status*

So far, we have barely begun to see how religious convictions can influence political judgments. On many important questions, a religious person's convictions will affect the way he decides what secular interests warrant protection and how much protection they warrant. Barbara may believe that scripture, or authoritative statements by church leaders, or individual prayer yields an answer to some moral or political question; or more general religious premises, like the centrality of the life of Jesus, may guide the perspectives she adopts. Often she may not be aware of the precise role her religious convictions play. I shall pay less attention to the kind of religious conviction that is influential than to the sort of political judgments they may influence.

Political decisions depend on a mix of evaluative and factual determinations. Suppose the issue is whether the county should agree to sweeping arms control limitations with the Soviet Union. Agreement will render the country somewhat vulnerable, but will certainly be in our long-term interest if the agreement is observed by both sides. In part the decision whether to agree turns on prediction of the likely behavior of Soviet leaders. Religions typically interpret human nature in some particular way. Adherents of different religious stances may have subtly different estimates of how people, or antireligious people, will respond to novel contingencies. An illustration of this reality is afforded by a very rough comparison of the attitudes of theologically conservative Protestants with those of theologically liberal Protestants. The former generally evidence a strong distrust of Communist leaders, the latter tend to be more sanguine about the possibilities of cooperation between our country and the Soviet Union. When religious convictions bear on factual determinations, those who rely on them are not imposing unaccepted value choices on nonbelievers; they are making the best judgments they can about how to serve shared objectives.

Government policies often must involve choices among desirable or undesirable outcomes. Suppose that a generous welfare policy will increase the standard of living of the poorest members of society, but, by reducing work incentives, will reduce the overall average standard of living as compared with a less generous welfare policy. If Paul's religious faith teaches that care for the poor is the preeminent demand of social justice, he is likely to suppose that the sacrifice in average welfare is warranted. In this instance, his religious convictions are employed to resolve a conflict between competing objectives, the welfare of the poor

and average welfare, each of which by itself is widely regarded as desirable.

The most striking and controversial use of religious convictions is to help resolve borderlines of status. Some political decisions turn on how important certain kinds of entities are. Religious convictions can figure in respect to animal rights, the treatment of severely handicapped babies, and the definition of death, but the most notable example is abortion. Proper legal treatment of abortion depends substantially on the proper moral view of the status of the fetus. Religious convictions often affect what people think is the moral status of the fetus at various stages of development. Someone who believes a fetus at some stage has the same moral status as a full human being is much more likely to support a restrictive approach to abortion at that stage than someone who thinks the fetus has no moral entitlement.

Although the point is often unrecognized, religious convictions figure here in quite a different way than they do when *all* that is claimed is that behavior is wrong from a religious point of view. In respect to abortion, the convictions influence judgment about which entities count as members of the community. The protection to be given these entities, protection of life, is protection of the most fundamental secular interest that members of a community have. What is involved is not a disregard of secular interests in favor of competing religious notions, but use of religious ideas to determine what is the range of secular interests that warrant protection.

In the major abortion case of the 1985 term, *Thornburgh v. American College of Obstetricians and Gynecologists*,[17] Justice Stevens, concurring, and Justice White, dissenting, commented on the relationship between religious convictions and views about abortion. Unfortunately, both comments are substantially misleading. Justice Stevens acknowledges that "a powerful theological argument" can be made for the position that "the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth."[18] Justice Stevens' response is that "our jurisdiction is limited to the evaluation of secular state interests."[19] A footnote to that passage talks about the lack of state responsibility for the soul of a newly born or unborn.[20] Contrary to what Stevens implies, the main claim for legal protection of fetuses does not rest on the state of their souls, but on their right to have their potential human lives protected. As I have indicated, that is a secular interest. What Justice White says on the subject is hardly more clarifying. He denies that according the fetus a high status

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[17] 106 S. Ct. 2169 (1986).
[18] *Id.* at 2188.
[19] *Id.*
[20] *Id.*, n.7.

from conception is "a theological position."[21] Referring to the proscription of killing in the Ten Commandments and the laws against murder, he says "a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others."[22] That much is undoubtedly true; if a state forbids racial segregation, it implicitly rejects the religious position that God requires racial segregation. But laws against murder and racial segregation are fully supportable on grounds that make no reference to religious claims. It is precisely the argument against a restrictive abortion law that such nonreligious grounds do not support it. So we find that Justice White obscures the possibly critical role of religious conviction in the anti-abortion position, while Justice Stevens obscures the fact that the position does not demand acceptance of other than secular interests.

What is the proper role of religious conviction in matters like those I have mentioned, arms control, welfare, and abortion? Remember, I am not now talking about either what is constitutionally allowable or what is, overall, desirable legislation. As I suggested in respect to consenting sexual acts, a ground may be constitutionally permissible and improper as a matter of political philosophy; and a ground for restriction that itself is proper may be overridden by a competing fundamental right, e.g., the right of a woman to control her body, that may render a prohibition undesirable or unconstitutional.

My general position is this. Liberal democracy involves a limited commitment to publicly accessible reasons and shared premises of justice. But when these are inconclusive, when people must revert to fundamental personal beliefs, neither the principle of nonsponsorship nor any other sound premise of our liberal democracy requires citizens to disregard the import of their religious convictions as they bear on critical factual determinations, conflicts of undeniable secular values, and borderlines of status. As citizens may rely on these convictions, legislators may give weight to the resulting judgments and may, when other grounds are not available, rely on similar judgments of their own.

B. Church-State Issues

The time has come to apply these general perspectives to issues that more directly concern church or religion and the state. The central question is whether religious citizens can reasonably be expected to try to decide such questions independent of their own religious convictions. I shall consider school prayer and a moment of silence, accommodations to religious conscience, and public aid to religious institutions that confer secular benefits.

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[21] *Id.* at 2197, n.4.
[22] *Id.*

1. Organized School Prayer and a Moment of Silence

Various arguments for and against organized school prayer are compatible with the premises of a liberal society. The main argument against school prayer is that in a society in which church and government are separate, the state should not be sponsoring religious exercises. If the state should not be sponsoring any particular religious view, a widely accepted premise, then any school prayer is bound to be highly dubious. Either the state itself composes or endorses particular prayers, or it leaves formulations to individual students, thereby in effect bolstering majority views over time. Any prayer undoubtedly is in tension with the somewhat more controversial premise that I accept, that the state also should not sponsor religion over nonreligion.

Of the claims in favor of group prayer in the public schools, I shall mention two: that since school occupies so much of the child's day, not to allow such prayer is to limit the possibilities of effective worship; and, that if the schools shut off all possibilities of organized group worship during the school day, the implicit message that is conveyed is that God and religion are unimportant.

Whatever its relevance for soldiers and prisoners, the argument in favor of prayer that concerns the time students are in school is implausible, at least for those whose religion does not demand prayer at particular times of day. Students have plenty of time outside school to engage in prayer.

The second argument is more disturbing. If in their most important social grouping outside the family, students are precluded from an opportunity of shared religious experience, then the implicit message of this school time may be that religion is not so important. This worry is softened, though not wholly eliminated, by the possibility that voluntary subgroups of students may be able to engage in group prayer outside of ordinary class time, say, during lunch. Since the liberal state should not be in the business of denigrating religion, practices that convey the message that religion does not matter much are not wholly consonant with liberal premises.

A person's assessment of the argument that students should have an opportunity for shared religious experience need not be directly determined by his religious convictions. Many religious people do not accept the argument; they believe religion can receive adequate emphasis elsewhere, in settings that do not put subtle pressures for conformity on those with minority views. On the other hand, some nonbelievers might be persuaded that fairness and neutrality indicate some place in school for voluntary prayer by interested students in the organized classroom setting.

In contrast with organized school prayer, which now is plainly precluded by Supreme Court doctrine,[23] a moment of silence at the beginning

[23] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

of the school day apparently remains a permissible constitutional option.[24] Most of the arguments for and against a moment of silence are similar to those applying to oral prayer, but their strength varies significantly. Though most people will understand that a silent moment is made available largely so that students who wish will have a chance to pray, the moment of silence constitutes a much weaker encouragement to religious practice and involves little or no imposition on those with unorthodox religious beliefs. As with organized prayer, a person's overall appraisal of the arguments for and against a moment of silence need not depend directly on his religious beliefs.

With respect to both issues, however, religious convictions may affect judgment once a person recognizes the competing considerations: that establishing prayers or silence may constitute some support to religion that trenches upon a principle of nonsponsorship and that refusal to have prayers or silence may indirectly convey the implicitly secularist message that religion is not central to life. When someone must squarely decide which horn of the dilemma to choose, his view of the value of public or silent prayers within large social groups that are not selected on religious bases may matter. And his estimate of the value of prayer in groups will almost certainly rest on his religious convictions. If George thinks religious beliefs are foolish and prayer a superstitious practice, the risk of indirect and implicit support of secularism will seem more tolerable than the state's relatively slight but direct support to religion involved in group prayer. If Agnes is persuaded that general group prayer or shared silence, largely employed for prayer, is important religiously and that religious practice is critical for human life, the tolerability of risks may seem reversed. It is not easy to see how George and Agnes could even approach this question while suspending all opinion about the value of religious practice. Since shared values and common forms of reasoning themselves provide no answer to the intrinsic importance of various religious practices, George and Agnes could not be expected to estimate the acceptability of the relevant risks without any reference to their own religious convictions. These would affect not only which risk a person would prefer to have run in respect to his own children, but also his view of which risk the public as a whole could better afford.

My own position about organized public school prayer is that the argument against it, based on the directness of the state's involvement and on the subtle coercion of group prayer on children of minority views, is so clearly the stronger that such prayer should be regarded as inappropriate in a liberal pluralist society. Moreover, I think our Constitution has properly been interpreted to require that result. A moment of

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[24] *See* Wallace v. Jaffree, 472 U.S. 38 (1985)(striking down moment of silence legislation because of obvious religious purpose).

silence, properly instituted and practiced, is much less threatening to liberal premises and is constitutionally acceptable, though its religious value is doubtful. In any event, my main point here is that liberalism does not demand that citizens attempt to resolve these questions wholly without reference to their own religious perspectives.

2. Claims of Conscience

Citizens and officials must evaluate claims that exceptions from ordinary rules should be made for those who have conscientious reasons for acting differently. The best known example is the problem whether conscientious objectors should be granted an exemption from required military service, an issue that arises even in a volunteer army for persons presently under a commitment to serve. Another example is the problem whether the government should require that employers make special accommodations in terms of days off or working conditions for those who conscientiously cannot work on certain days or under certain conditions. One question that arises is whether any exemption from a particular rule should be granted; a second question is whether an exemption should be cast in terms of religious belief and association.

Common forms of reasoning have a substantial bearing on the possibility of exemptions for those whose conscience forbids their conformance to ordinary requirements, and on how such exemptions should be formulated. On the one hand, futilely demanding that people do what they regard as morally abhorrent is not the most productive use of rules, and is bound to cause resentment among those whose conscience is burdened. Moreover, casting an exemption in religious terms might reasonably be thought to make more accurate administration possible or to identify a class whose feelings of conscience will be especially strong, and to represent a proper accommodation to a sphere of life that may conflict with state authority.

On the other hand, exceptions may generate inequity, prove difficult to administer, and weaken the force of a rule's general application. Furthermore, any straight preference for religious conscientious claims over nonreligious ones tends toward state support of religion and may be unfair, and religiosity may be thought an inaccurate or inappropriate basis for recognizing those with especially strong claims or for simplifying administration. These arguments against religious categorization have generally been thought to have persuaded the Supreme Court in the *Seeger*[25] and *Welsh*[26] cases to interpret out of existence the efforts of Congress to limit the exemption from military service to distinctly religious objectors.

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[25] United States v. Seeger, 380 U.S. 163 (1965).

[26] Welsh v. United States, 398 U.S. 333 (1970).

No uniform satisfactory answer can be given to the questions whether there should be any exemption from an ordinary rule or practice and whether, if so, the exemption should be cast in religious terms. As to the creation of any exemption, much depends on the degree of need for uniform observance and on the possibilities of fraudulent claims. As to the possibility of defining the exempted class in terms of religion, it will matter whether the conscientious objection is of a kind likely to be raised by nonbelievers and whether sincere religious objectors are much easier to identify than sincere nonreligious ones. I strongly believe that when feasible, a system of self-selecting exemptions, in which anyone is free to choose the alternative to what is normally demanded, but in which the alternative carries burdens that would lead most people to choose subjection to the standard requirements, is far preferable to the state's deciding who is and who is not a conscientious objector.[27]

However one resolves these issues, it is unlikely that one can, or should, try to approach them in disregard of one's own convictions about religious and moral truth. If Michael believes that there exists an objective religious truth whose moral demands may conflict with the state's requirements, he may be more disposed to think that conscience should be accommodated more than someone who does not believe in transcedent sources of moral truth. Further, if Michael thinks that religious truth actually requires action that is contrary to what is demanded by present state requirements, as a religious pacifist would feel about a general conscription law, he will rate the need for accommodation very high. A pacifist who derives his views about war from religious premises is not required by liberal principles to put his religious convictions out of his mind when he thinks about whether pacifists should receive an exemption.

3. Public Aid to Religious Institutions Conferring Secular Benefits

Many religious organizations perform social services that confer an undoubted secular benefit. One thinks of religious hospitals, religious schools, and religious charities for the poor. If the state chooses to help finance private nonreligious conferrals of such benefits, its failure to assist private religious organizations may compromise its efforts and may constitute a discrimination against religion. If the state includes religious organizations, it may end up aiding the religious purposes of the organizations. At this time, financial aid to religious hospitals and charities for the poor is noncontroversial. As far as financial support is concerned, religious organizations are simply treated like other private organizations engaging in the same endeavors. Aid to religious schools, on the other hand, is marked by intense controversy and continuing

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[27] These matters are explored in much more depth in K. GREENAWALT, CONFLICTS OF LAW AND MORALITY, Ch. 14 (1987).

constitutional litigation. The twofold explanation for the difference concerns the special place of the public school in the United States and the perception that in parochial schools a close connection exists between religious instruction and education in standard subjects.

Neither liberal principles nor constitutional clauses provide pat answers to the degree of acceptable support for religious organizations that make direct contributions to secular objectives. Assuming that a form of aid is constitutionally permissible, how is an individual to decide whether that aid should be given? Let us concentrate on marginal and permitted aid to private schools. If aid is to be given to all private endeavors, the vast majority of beneficiaries will be religious organizations. How one rates the importance of assisting the secular objective of the private schools against the risks of assisting religious objectives will depend partly on how valuable one thinks private parochial education is. Can this judgment be made without reference to one's religious convictions? If Sara believes that the best education for children is by religious organizations, a view that does not *by itself* run afoul of liberal principles, she will be inclined to suppose that giving state support to secular functions warrants the risk of oblique support for religious objectives. If, instead, she believes that religious training is misconceived and harmful or that attitudes necessary to maintain a liberal pluralist society can only be promoted in a state school environment, she is likely to take a different view of the harms and benefits of state aid. One's own religious convictions are bound to figure in one's estimate of the ideals for religious education in a liberal society, as well as whether one wishes to have one's own children supported in religious schools.

With respect to school prayer, claims of conscience, and aid to religious institutions conferring secular benefits, we have seen that nonreligious arguments can be offered on both sides of the issues as they arise in particular contexts. Relying on religious conviction in the sense of favoring a result because it will promote one's own religious views or because it will directly embody one's religious conception of how a proper society is organized may be at odds with liberal democratic principles; but a good citizen could not and need not disregard his religious convictions in assessing the balance of the ordinary arguments.

V. Discourse, Official Action and Constitutionality

I have thus far addressed how a citizen develops his own position on church-state issues. A citizen sometimes votes directly on such issues, but more commonly they figure in support of one candidate or another or in the citizen's efforts to get legislators to act.

Any complete account of religious convictions and church-state issues would have to deal with a number of related subjects. I shall indicate some of these and briefly state my position without trying to develop it.

What arguments should people use in public forums to support their positions? Discussion in theological terms is certainly appropriate among

those who share basic religious convictions but, in general, publicly accessible reasons and ways of determining facts are the proper subjects of discourse in a liberal, pluralist society. A religious believer should not willfully conceal the effect his own religious convictions have on his position, but he should not urge detailed religious arguments in support of the position. What I am suggesting is that the appropriate role of religious convictions looms larger in personal decisions about political issues than in public dialogue over competing positions.

When religious convictions figure for citizens in the way I have suggested is proper, they are appropriately given weight by legislators whose decision is determined partly by constituency opinion. Because legislators represent persons of many religious persuasions, they should hesitate to give great effect to their own religious convictions, but in situations in which other guides are inconclusive, this reliance may also be warranted.

It is a rare church-state case in which subjective motivation is critical to a court's determination of constitutionality. I regard the Supreme Court's decision striking down Alabama's moment of silence statute as such a case, though the majority opinion is susceptible of other interpretations.[28] Assuming that motivation can matter, I believe that what I have said so far does have implications for constitutional law, though the implications will rarely be of practical significance.

The Establishment Clause and, perhaps, notions of substantive due process, should be viewed as sufficiently broad to encompass the constraints on political decision I have suggested. That is, a law that is mainly designed to promote religious views or that is mainly an implementation of pure religious notions of wrong should be regarded as, in some sense, an unconstitutional exercise of power. Whether or not courts are equipped to undertake this inquiry or should ever actually invalidate a law on this basis is another question, though I believe that if the underlying ground for legislation is sufficiently clear, invalidation is appropriate. The reason why I do not think acceptance of this principle has much practical importance is that very rarely will an underlying inappropriate basis for decision be both critical *and* clear. Reliance on religious convictions in the way I have suggested is appropriate is no ground for viewing the legislation that results as unconstitutional.

In sum, my message is that we need to be much more discriminating in our understanding of the ways in which religious convictions figure in political decisions and that the need for this more sensitive understanding applies to typical church-state problems, as well as other political issues of public concern.

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[28] Wallace v. Jaffree, 472 U.S. 38 (1985). The revealed motivations of the legislators might be thought to alter the effect of a law on the public.